ORIGINAL

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**





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| **In the Matter of** | ) | |
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| **America's Carriers Telecommunication Association ("ACTA")** | ) | **RM-8775** |
| | ) | |
| **Petition for Declaratory Ruling, Special Relief and Institution of Rulemaking** | ) | |

**REPLY COMMENTS OF**
**MFS COMMUNICATIONS COMPANY, INC.**

MFS Communications Company, Inc., by its undersigned counsel and pursuant to Section 1.405 of the Commission's Rules, hereby submits its Reply to the Petition for Declaratory Ruling, Special Relief and Institution of Rulemaking of America's Carriers Telecommunication Association ("Petition"). In essence, ACTA's Petition requests that the Commission rule on the narrow issue of whether software used to provide voice services over the Internet are, in fact, subject to the Commission's jurisdiction.[1] As detailed below, MFS believes that as a general proposition, the public interest mandates that the Commission forbear from regulating the Internet. Further, MFS believes the issue of RBOC provision of Internet services raised in its initial comments, along with access charge and universal service issues raised by other parties, should be addressed in other rulemaking proceedings. For example, Internet access charge issues should be considered in the access charge reform proceeding.

[1] *See* Petition for Declaratory Ruling, Special Relief, and Institution of Rulemaking of the America's Carriers Telecommunications Association, filed March 4, 1996.

## I. INTRODUCTION AND SUMMARY

MFS urges the Commission to reject ACTA's Petition without further consideration for the following reasons:

- Internet service providers and software providers do not provide "telecommunications services" and therefore may not be classified or regulated as "telecommunications carriers" under the Communications Act of 1934, as amended ("Communications Act").

- Section 230(b)(2) of the Communications Act plainly states that it is the policy of the United States not to subject "the Internet and other interactive computer services" to federal and state regulation.

- The Internet is a highly innovative, fully competitive market that should remain unaffected by regulation. Even if, contrary to the foregoing arguments, the Commission were to conclude that it has statutory authority to regulate the Internet, it should nonetheless forbear from regulating such providers to preserve the intent of the Telecommunications Act of 1996 ("1996 Act").

## II. THE INTERNET IS A HIGHLY INNOVATIVE, FULLY COMPETITIVE MARKET THAT SHOULD REMAIN UNFETTERED BY REGULATION

As detailed in numerous comments, free from government regulation and standards, the Internet has developed into a fully competitive, interconnected, highly efficient, and innovative marketplace.[2/] The reasons for this astounding growth are simple. The Internet offers end-users a new way to communicate, learn, explore and interact with others around the world at a price far below any other available options. Furthermore, unlike most other telecommunications markets, there is a very low barrier to entry, either as a user, service provider or distributor of content.

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[2/] As evidence of the Internet's success, IDC and Oppenheimer & Company recently reported that it expected the number of Internet users to grow from 56 million in 1995 to over 200 million by the end of 1999.

MFS is not alone in its view that the imposition of outmoded regulatory models upon the Internet industry could have disastrous consequences -- stunting growth, placing U.S. companies at a competitive disadvantage in a worldwide marketplace, and increasing access prices, thereby limiting access to economically disadvantaged.[3/] Indeed, Congress recognized the potential for adverse impact of regulation when it affirmatively stated that to preserve the vibrant and competitive free the Internet and other interactive computer services. unfettered by Federal or State Regulation. *See* 47 U.S.C. § 230(b)(2). Accordingly, MFS joins Computer Professionals for Social Responsibility and the Benton Foundation, the Commercial Internet Exchange Association, Compuserve, and Microsoft, among others, in urging the Commission to refrain from asserting jurisdiction over a marketplace that has been nothing less than a stunning success and a model of perfect competition for the telecommunications industry.[4/]

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[3/] *See, e.g.*, Comments of Center for Democracy and Technology, Comments of Netscape, and Microsoft.

[4/] For example, while the Commission is considering the imposition of "bill-and-keep" upon CMRS providers, the Internet has already adopted such a model and ISPs do not charge one another for terminating the traffic of another ISP's customer. Furthermore, Internet subscribers that register their own domain name have, in essence, what amounts to "number portability." Unlike the case with landline or wireless telephony today, Internet end-users can easily and transparently switch from one ISP to another. The ability to switch ISPs keeps these providers' prices and services competitive.

MFS also concurs with Netscape that the Internet is "inherently an interstate service [Netscape at 29-32] . . . that is completely distance-insensitive and almost entirely location indifferent." *Id.* at 30. The Commission should "recognize that Internet communications are inherently interstate, and on that basis either classify Internet telecommunications services as "jurisdictionally" interstate or affirmatively preempt state public service commission regulatory authority over the Internet." *See, e.g.*, Comments of Computer Professionals for Social Responsibility and the Benton Foundation at 4; the Commercial Internet Exchange Association at 4-7; Compuserve at 6-8.

## III. THE COMMISSION MAY NOT ASSERT JURISDICTION OVER INTERNET SOFTWARE OR SERVICE PROVIDERS

Consistent with the position of many commenters, MFS concurs that the plain language of the Telecommunications Act of 1996 ("1996 Act")[5] does not support ACTA's position that software publishers are telecommunications carriers subject to the Commission's jurisdiction.

As detailed in the comments of the Business Software Alliance, Section 3 of the 1996 Act establishes a definitional framework that clearly excludes software publishers from the Commission's jurisdiction.[6] Specifically, in order to be classified as a telecommunications carrier under the 1996 Act, software publishers would have to: (1) offer telecommunications; (2) for a fee; (3) directly to the public. In order to be considered to be offering "telecommunications," a software publisher would have to: (1) *transmit* information "between or among points specified by the user," (2) *transmit* information "of the user's choosing," and (3) *transmit* such information "without change in the form or content of the information as sent and received."

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[5] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 60 (1996) ("1996 Act").

[6] *See, e.g.*, Comments of Netscape at 20 (stating that "the Commission enjoys no statutory jurisdiction over computer software providers . . . which *enable*[] communication. The 1996 Act's definition of 'telecommunications service' makes plain that software providers are not carriers because they do not offer 'telecommunications for a fee,' but rather sell software products.); Comments of ITI at 5-7 (stating that as "access software" providers, software providers cannot be considered "telecommunications carriers"); Comments of Information Technology Association of America at 5 (noting that "Internet telephone software vendors do not provide a service, much less transmission capacity for the movement of 'information of the user's choosing."); Comments of Compuserve at 6 (stating that "examination of the new statutory provisions demonstrates that the computer software products at issue do not fit within the statutory definitional framework. . . to state the obvious . . . they do not provide any transmission services, and, thus do not provide 'telecommunications.').

Contrary to ACTA's assertions, software providers clearly fail to satisfy these conditions. First, software providers do not engage in the transmission of information between or among points specified by the user. In order to transmit information, the customer must first obtain transmission facilities from a carrier. Second, software products are not "telecommunications" because they do not necessarily transmit information only of the user's choosing. For example, some software input and output may be generated randomly by the host computer or a connected unit. Third, software does not perform "telecommunications" because it does not necessarily transmit information without a change in the form or content of the information as sent or received. Frequently, software will encode or *reformat* information during input or in preparation for transmission. For example, word processing software frequently translates the user's keystrokes into one of many public or proprietary formats. Similarly, computer facsimile software must convert and reformat text into bitmap images before transmitting data.

As outlined in the initial comments of MFS and echoed by the clear majority of commenters, neither software nor software publishers provide telecommunications or are telecommunications carriers subject to the Commission's regulation.[7] As a simple matter, neither software nor software publishers provide "telecommunications." Because software vendors "do not provide *transmission*"

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[7] Comments of MFS at 4-5. *See, e.g.*, Comments of Business Software Alliance; Comments of Microsoft; Comments of Millin Publishing Group; Comments of Netscape; Comments of Software Industry Coalition; Comments of Software Publishers Association; Comments of Third Planet Publishing; Comments of AT&T.

they cannot be considered carriers under the Act.[8] Accordingly, there is no basis for ACTA's assertion that the FCC may assert jurisdiction over software manufacturers of software itself.[9]

Further, as discussed in the Joint Opposition of VocalTec, Ltd. and Quarterdeck Corporation ("Joint Opposition"), MFS submits that:

> Even if the Commission were to find it has jurisdiction to regulate [software providers] generally. . . it should exercise that jurisdiction in the same fashion as it has for Customer Premises Equipment ("CPE") and enhanced services.[10]

MFS concurs with the Joint Opposition's view that Internet voice software is analogous to CPE. As VocalTec and Quarterdeck and other parties argue, voice software publishers should not be regulated by the Commission as carriers. In fact, the Commission deregulated the provision of CPE in both landmine and wireless contexts and has expressly preempted the states from regulating the provision of CPE.[11]

The 1996 Act clearly establishes that the Internet is to remain unregulated by declaring it to be "the policy of the United States . . . to preserve the vibrant and competitive free market that

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[8] *See, e.g.*, Comments of AT&T at 3; Comments of Millin Publishing Group at 6; Comments of Compuserve at 6.

[9] As MFS also noted in its initial comments, software does not necessarily "transmit information only of the user's choosing," nor does in not necessarily transmit information without a change in the form or content of the information as sent or received.

[10] *See* Joint Opposition at 17. *See, e.g,* Comments of MFS at 4-5; Comments of Pacific Bell and Nevada Bell at 4-6 (stating that regulation of software providers would appear to constitute regulation of CPE and information service providers and such regulation would be a major step backward.); Comments of National Telephone Cooperative Association (software vendors are not common carriers); Comments of AT&T Corporation at 2-4 (software vendors are not "carriers" under the 1996 Act).

[11] *Id.* at 17-19.

presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[12] It would be contrary to the deregulatory goals of the 1996 Act for "one of the Commission's first actions after passage of this pro-competitive statute [to be] to regulate the now unregulated world of the Internet."[13]

## IV. THE COMMISSION SHOULD APPLY THE FORBEARANCE PROVISIONS OF SECTION 10 OF THE COMMUNICATIONS ACT TO THE INTERNET

Section 10 of the Communications Act provides that the Commission must forbear from applying any regulation or provision of the Communications Act if:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory;
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> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
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> (3) forbearance from applying such provision or regulation is consistent with the public interest.[14]

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12/ Telecommunications Act of 1996, Pub. L. No. 104-104, § 509, 110 Stat. 56 (1996).

13/ *See, e.g.*, Comments of Microsoft at 3. Apart from whether the Commission may regulate the Internet under the 1996 Act, numerous parties brought to light the practical impossibility of FCC regulation of services provided over the Internet. *See, e.g.*, Comments of BBN at 6 (stating that ISPs are not equipped to differentiate between digital bits that support differing applications); Comments of Center for Democracy and Technology (stating that implementation of the relief requested in the ACTA Petition would require the Commission to regulate otherwise indistinguishable data packets); Comments of Netscape at 16-18 (noting that regulation of services provided via the Internet would present difficult and potentially insoluble technical problems).

14/ 47 U.S.C. §160 (1996).

Accordingly, Section 10 of the Communications Act grants the FCC broad authority to forbear from regulation if, in the absence of regulation, consumers and the public interest will not be adversely affected and the Commission can nevertheless ensure that the rates, terms and conditions of the offered service will remain reasonable and nondiscriminatory. In determining whether forbearance should apply in a particular circumstance, the Commission itself has stated that it is required to consider whether forbearance will "promote competitive market conditions, including the extent to which forbearance will enhance competition."[15]

MFS concurs with the position of a majority of the commenters and concludes that, in most instances, the Internet and the provisioning of Internet services are subject to competition and cannot usually be offered at unreasonable rates or in a discriminatory fashion.[16] For example, Netscape notes that virtually all Internet service providers ("ISPs") are moving now toward "flat-rate" pricing structures under which Internet access is offered for a low fee to users without regard to application or message volume.[17] As suggested by some commenters, attempts to regulate Internet usage could lead to what amounts to "the imposition of taxes and tariffs for data transmissions" which would increase end user prices.[18] Accordingly, regulation, tariffing, or monitoring of Internet traffic flow,

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[15] *See* Notice of Proposed Rulemaking, *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61 (released March 25, 1996).

[16] *See, e.g.*, Comments of Business Software Alliance at 6; Comments of Commercial Internet eXchange Association at 10-12; Comments of Microsoft at 4. *Cf.* Section III, *infra*.

[17] Comments of Netscape at 18 (stating "[v]irtually all ISPs and OSPs are moving toward 'flat-rate' pricing structures, under which IP access is offered to users, without regard to application or message volume, in large locks of time, ranging from 10-30 hours to monthly packages.")

[18] *See, e.g.*, Comments of the New Media Coalition for Marketplace Solutions at 11-12.

if feasible,[19] would, in most cases, do nothing to increase competition, reduce costs, improve services, or to make rates somehow more reasonable.[20]

Additionally, MFS joins Microsoft and others in their recognition that the careless imposition of regulation could have "significant adverse effects on the development of the Information Superhighway"[21] For example, NTIA notes that the Internet now connects more than 10 million computers and tens of millions of users with growth occurring at an approximate rate of 10 to 15 percent a month. This rapid growth has been fueled, in large part, by the absence of regulation

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[19] Numerous commenting parties suggest that it would be impossible for the Commission to monitor or regulate data flow over the Internet. *See, e.g.* Comments of Netscape at 16-18 (regulation of services over the Internet would create "insoluble" technical problems); Comments of BBN at 6 (indicating that ISPs are not equipped to distinguish between bits insofar as some transmission would be regulated and others not). *See also*, Comments of Microsoft at 7 (declaring functioning as the "bit police" is practically impossible and is a role the Commission cannot fulfill in any realistic manner).

[20] In many ways, the Internet now serves as a model of efficiency and competition. For example, while the Commission is considering the imposition of "bill-and-keep" upon CMRS providers, the Internet already utilizes the "bill-and-keep" model. Accordingly, ISPs do not charge one another for terminating the traffic of another ISP's customer. Furthermore, Internet subscribers that register their own domain names have, in essence, what amounts to "number portability." Unlike the case with landline or wireless telephony today, Internet end-users can easily and transparently switch from one ISP to another. The ability to switch ISPs keeps these providers' prices and services competitive. MFS notes that these competitive Internet policies have developed in the absence of regulation. Accordingly, MFS echoes Compuserve's concern that careless attempts to regulate the use of the Internet could have "an adverse effect on the many innovative new service offerings, strategic business partnerships, and pricing reductions being introduced practically every day." Comments of Compuserve at 14-15. MFS also joins with the Commercial Internet eXchange Association in rebutting ACTA's assertion that regulation of Internet voice services will somehow improve the current technical and resource limits of the Internet. *See* Comments of the Commercial Internet eXchange Association at 4.

[21] *See* Comments of Microsoft at 3; *See also* Comments of Millin Publishing Group at 5; Comments of Software Industry Coalition at 2; Comments of Third Planet Publishing, Inc. at 6.

which has, in turn, enabled countless entrepreneurs to begin offering Internet service, often times in rural areas or smaller towns where access would otherwise be unavailable. The imposition of Commission regulation upon these non-dominant, entrepreneurial ISPs, and the costs associated therewith, could easily force a substantial number of these providers to cease the provisioning of their services.

Lastly, MFS acknowledges the comments of numerous parties and their collective concern that the imposition of regulation on the Internet could impede use of and access to the network for educational purposes.[22/] These parties' appropriately recognize that Congress clearly intended that the 1996 Act serve to promote educational institutions' access to advanced telecommunications and information services.[23/] Nevertheless, the imprudent imposition of regulation could threaten to undermine these important goals. Cornell University, for example, notes that regulation of the Internet could interfere with the use and development of CU-SeeMe, a free video conferencing

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22/ *See, e.g.* Comments of Educom; Comments of FARNET; Comments of Cornell University.

23/ *See* 47 U.S.C. § 254(h)(2)(A)(1996) (providing that the Commission shall establish rules "to enhance. . . access to advanced telecommunications and information services for all public and non-profit elementary and secondary school classrooms, health care providers, and libraries.). *See also* 47 U.S.C. 271(g)(2) (implicitly recognizing that Internet services are interLATA but nevertheless allowing BOCs to provide Internet services over dedicated facilities to or for elementary schools without first having to satisfy the competitive checklist items contained in Section 271 or the separate subsidiary requirements of Section 272); *See generally*, Notice of Proposed Rulemaking and Order Establishing Joint Board, *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (released March 8, 1996) at ¶¶ 77-79 (noting that only 9 percent of all instructional classrooms are currently connected to the Internet, and considering whether such services should be included within the types of services that carriers must make available to schools and libraries pursuant to Section 254 of the Communications Act); Comments of Netscape in CC Docket 96-45 (noting that "[t]he Internet represents the optimal means of meeting Section 254's mandate of making advanced telecommunications services and information service access available.")

program that has been used in conjunction with the Internet to "link[] school children from around the world."[24] Similarly the Federation of American Research Networks expressed its concern that regulation of the Internet in the fashion proposed by ACTA was inconsistent with the public interest and public policy goals fostered by allowing "school children to communicate in real-time" at affordable rates.

Accordingly, for all of the reasons stated above, the Commission should clearly forbear from regulation of the Internet absent a display of market power[25] or " a market failure that requires active government intervention."[26]

## V. OTHER FUNDAMENTAL ISSUES THAT THE COMMISSION MUST ADDRESS WITH REGARD TO THE INTERNET

In its initial comments, MFS asked the FCC to issue a clear statement that, consistent with Section 271 of the Communications Act, that "[n]either a Bell operating company nor any affiliate of a Bell operating company" be permitted to offer or provide in-region interLATA Internet service without satisfying the same conditions necessary before it may offer in-region interLATA circuit switched traffic.[27] MFS expressed concern that in the absence of such a clear statement, incumbent LECs could skirt their obligations under the 1996 Act and exploit 'the Internet' to provide regulated

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24/ *See* Comments of Cornell University at 1.

25/ *See* Comments of Netscape at 15.

26/ *See* Comments of Microsoft at 3.

27/ Comments of MFS at 2-4.

interLATA or other services before meeting statutory requirements.[28] On June 6, 1996, the Commission released an Order approving Bell Atlantic's Plan to offer comparably efficient interconnection ("CEI") to providers of Internet access services ("CEI Order"), in which it deferred for further consideration in a separate proceeding important issues related to the BOC provisioning of Internet services. MFS remains concerned about RBOC provisioning of Internet services and eagerly awaits the opportunity to comment in the Commission's promised rulemaking proceeding. Further, MFS believes that access charge issues raised by a number of commenters, including AT&T, Pacific Bell and Nevada Bell, should be considered as part of a broader access charge reform proceeding, not in response to the ACTA Petition.

[28] *Id.* at 3.

## VI. CONCLUSION

As detailed above, MFS believes that the public interest mandates that the Commission forbear from regulating the Internet. Nonetheless, MFS believes that there are significant issues involving RBOC provision of Internet services, access charges and universal service that the Commission should consider in the context of separate proceedings. MFS eagerly awaits the opportunity to participate in these proceedings.

Respectfully submitted,

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